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No. 90-163

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

GARY O. EVERETT,

Petitioner,

vs.

I-NET, INC., and KAVAL R. BAJAJ, and KEN BAJAJ

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES BELOW

The caption of the case contains the names of all parties to the proceedings below. There are no parent companies or subsidiaries of I-NET, Inc.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia is set forth at pages A-21 through A-29 of the Petition for Writ of Certiorari (the "Petition"). The Opinion of the United States Court of Appeals for the Fourth Circuit is set forth at pages A-1 through A-18 of the Petition.

FEDERAL RULES INVOLVED

In addition to the Federal Rules of Civil Procedure which are set out in the Petition, the following rule is applicable here:

> **RULE 52. Findings by the Court**
>
> **(b) Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

STATEMENT OF THE CASE

This case involves a dissatisfied minority shareholder's action to dissolve I-NET, Inc. ("I-NET"), a Maryland corporation, or to force I-NET to purchase his interest at fair value. Gary O. Everett ("Everett"), a minority shareholder, filed suit against I-NET, the majority shareholder, Kaval R. Bajaj ("Kaval")[2], and her husband, Ken Bajaj, in the United States District Court for the Eastern District of Virginia, Alexandria Division. Everett's claims arise out of an agreement that he negotiated and entered into on January 6, 1985, with Kaval Bajaj, the owner of a start-up business which was subsequently incorporated as I-NET.

Everett filed a Verified Complaint on October 7, 1988, and filed an Application for Temporary Restraining Order and Affidavit in Support Thereof on October 18, 1988. App. at 1, 110.[3] In his Verified Complaint, Everett alleged that he is entitled to 245 shares or 24.5% of the common stock of I-NET, the successor corporation to the business. App. at 9, Paragraph 21.

Everett filed an Amended Complaint on November 16, 1988, and included a new claim for a partnership interest, in addition to the shareholder interest he originally claimed. App. at 38. In his Amended Complaint, Everett alleged that the January 6, 1985, agreement formed a Virginia partnership which never changed and that he is entitled to 24.5% of the profits. In the alternative, Everett sought relief under Maryland corporate law.

The action was tried before the Honorable Claude M. Hilton, United States District Judge, sitting without a jury on March 20-21, 1989.

Everett's attorney engaged in a lengthy colloquy with the trial court judge at the outset of the trial. During the course of this exchange, the trial court repeatedly pressed Everett to articulate with precision both the issues to be tried and the relief sought. App. at

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[2] Since there are two Bajajs referred to in the record, we will refer to Kaval Bajaj as "Kaval".

[3] Citations designated as "App. ___" are to the Appendix filed with the court of appeals.

151-76. At the close of the colloquy, after conferring privately with Everett, Everett's counsel voluntarily narrowed the issues to be tried to shareholder oppression, thereby abandoning any other previously asserted issues. App. at 171-72. The parties did not litigate and the district court did not rule upon the other claims asserted in the Amended Complaint. App. at 267, 382, 435-52.

The court granted the defendants' motion for judgment under Rule 41(b) of the Federal Rules of Civil Procedure at the close of Everett's evidence and dismissed the Amended Complaint except for the conveyance of 245 shares of I-NET stock. At the time of his ruling, Judge Hilton made findings of fact and conclusions of law, which are set forth in a transcript at pages A-21 through A-29 of the Petition for Writ of Certiorari. On April 7, 1989, on Everett's motion, the court amended its March 21, 1989, Order to reflect that Everett had been the owner of the 245 shares since the date of incorporation. Everett appealed from these Orders to the United States Court of Appeals for the Fourth Circuit.

Everett did not file a motion pursuant to Rule 52(b) of the Federal Rules of Civil Procedure seeking to amend or supplement the district court's findings of fact and conclusions of law.

On appeal, Everett argued that the district court erred in ruling that he is not entitled to relief under Virginia partnership law or Maryland corporation law. Everett did not raise on appeal the issue of whether the district court's oral findings of fact and conclusions of law were inadequate. Everett argued that the January 6, 1985, agreement established a partnership under Virginia law. He maintained that the corporation is now an asset of the partnership, and that as a partner he is entitled to an accounting of the partnership assets and to dissolution of the partnership and distribution of its assets. Fourth Circuit Opinion at 6. The Fourth Circuit declined to address these contentions because it found that Everett waived his Partnership theory prior to trial in the colloquy with the district court when the district court questioned counsel about the theory of his case. The Fourth Circuit noted that counsel was unable to give the court a clear response to the theory of his case or the relief he was seeking. The Fourth Circuit found that at the conclusion of the colloquy, the district court reiterated its understanding of Everett's

counsel's explanation of his case, limiting the issue to oppression, and that Everett's counsel acquiesced in the court's statement of his case, never protesting that his partnership theory was being overlooked.

On March 26, 1990, the Fourth Circuit affirmed the judgment of the district court in an unpublished, per curiam opinion. The Fourth Circuit's Opinion is set forth at pages A-1 through A-18 of the Petition for Writ of Certiorari. In addition, the Fourth Circuit ruled that the factual findings of the district court that Everett was not entitled to relief under Maryland corporate law are not clearly erroneous.

Everett filed a petition for rehearing and suggestion for hearing in banc, which the Fourth Circuit denied on April 20, 1990.

Everett now asks this Court to overturn the Fourth Circuit's finding that he waived his partnership claims.

REASONS WHY PETITION SHOULD BE DENIED

Summary

None of the considerations governing review on a writ of certiorari that are set forth in Rule 10 of the Supreme Court Rules are applicable here. The Fourth Circuit's opinion below does not conflict with the decision of another United States Court of Appeals, and does not involve any federal question. Nor has either the district court or the Fourth Circuit departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. Everett's complaint is with the Fourth Circuit's application of the Federal Rules of Civil Procedure to his case. The first question presented for review by Everett asks this Court to consider his objection to the adequacy of the district court's oral findings of fact and conclusions of law, which was not even raised in the court of appeals or addressed by that court, and therefore is not properly before this Court for review[1]. Rule 52(b) of the Federal Rules of Civil Procedure provides a procedure for amendment of findings and conclusions in the district court upon motion of a party made not later than ten days after entry of judgment. Everett did not object to the district court's findings nor make a motion to amend them.

In the second and third questions presented for review, Everett asks this Court to review the Fourth Circuit's affirmance of the district court's determination that Everett waived his partnership claims before trial. These are factual issues which were passed upon not only by the district court judge, but by a unanimous Fourth Circuit panel.

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[1] Everett raised this issue for the first time in his Petition for Rehearing, which was denied.

I. EVERETT DID NOT PRESENT HIS OBJECTIONS TO THE SUFFICIENCY OF THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW TO EITHER THE DISTRICT COURT OR TO THE COURT OF APPEALS AND CANNOT NOW RAISE SUCH OBJECTIONS ON APPLICATION FOR A WRIT FOR CERTIORARI.

Everett argues in his Petition that the trial court failed to make the requisite findings of fact and conclusions of law required by Rule 52(a) of the Federal Rules of Civil Procedure. In its ruling on the defendants' motion for judgment, however, the district court did make oral findings of fact and conclusions of law, which are set forth in the transcript at pages A-21 through A-29 of the Petition. Rule 52(a) provides that it is sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court, as the district court did here.

Everett now argues in his Petition that the district court's oral findings of fact and conclusions of law, which are set forth in nine pages of the Appendix to his Petition, are conclusory and unelaborated findings of ultimate fact and are therefore insufficient. Everett did not, however, raise these objections either in the district court or in his appeal to the Fourth Circuit. He raised these objections for the first time in his Petition for Rehearing and Suggestion for Rehearing In Banc. It was therefore not proper for Everett to raise his objections to the sufficiency of the district court's findings, which were new grounds, in his Petition for Rehearing, which must be limited to matters of fact or law which are alleged to have been overlooked. Fed. R. App. P. 35, 40. Everett's objections to the sufficiency of the district court's findings were never presented to or ruled upon by the court of appeals.

A contention that was not raised in the court of appeals and was not addressed by that court will not be considered for the first time in the United States Supreme Court. Rogers v. Lodge, 458 U.S. 613, rehearing denied, 459 U.S. 899 (1982). This Court has held that an argument raised for the first time in response to a

motion for rehearing in the court of appeals would not be considered by the Supreme Court on appeal. Hoover v. Ronwin, 466 U.S. 558 (1984). Accordingly, Everett's objections to the sufficiency of the district court's findings should not be considered by this Court for the first time on his Petition for Writ of Certiorari.

II. EVERETT WAIVED HIS RIGHT TO OBJECT TO THE ADEQUACY OF THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW BY FAILING TO MOVE FOR AN AMENDMENT TO THE FINDINGS OR FOR ADDITIONAL FINDINGS.

Rule 52(b) of the Federal Rules of Civil Procedure provides a procedure whereby a party can move the court for an amendment to its findings or to make additional findings. Everett did not file a motion with the district court for such amendment to its findings or for additional findings. By failing to follow this procedure, Everett waived any objections he had to the sufficiency of the district court's findings.

Appellate courts have refused to consider objections to the form of the findings if those objections were not raised in the district court. Wright & Miller, Federal Practice and Procedure: Civil, sec. 9 2581 (1971). A motion to amend the findings cannot be made in the appellate court by a party who failed to make it in the trial court. Id. at sec. 2582.

III. THE DISCRETIONARY JURISDICTION OF THIS COURT SHOULD NOT BE EXERCISED HERE TO REVIEW THE FINDING OF THE COURT OF APPEALS THAT EVERETT WAIVED ALL OF HIS PARTNERSHIP CLAIMS.

Here, there is no conflict of opinion between the lower courts to be resolved, nor is there any question of wide import at issue. The questions presented here have no importance beyond the particular facts and parties involved.

The Fourth Circuit has already considered the issue of whether Everett waived his partnership claims, and after reviewing the record of the proceedings in the district court, found, per curiam, that Everett had waived his partnership theory in a colloquy with the district court before trial. The Fourth Circuit likewise rejected Everett's argument in the alternative that the district court ruled against him on his partnership theory prior to trial. Everett asks this Court to review the Fourth Circuit's finding, which depends upon an analysis of the specific facts.

This Court has been extremely reluctant to grant certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved and has often held that:

> a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error. Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949), and cases cited; Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967); Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980); Rogers v. Lodge, 458 U.S. 613, 623 (1982); United States v. Doe, 465 U.S. 605 (1984); NCAA v. Board of Regents, 468 U.S. ___, ___ n.15 (1984).

Stern, Gressman & Shapiro, Supreme Court Practice, 218 (6th ed. 1986) (footnote omitted).

Here, there is no obvious and exceptional error which requires this Court's exercise of jurisdiction to review the Fourth Circuit's affirmance of a fact-based decision.

Respondent's submit that this application is in direct opposition to Chief Justice Vinson's well-known explanation of this court's discretionary jurisdiction:

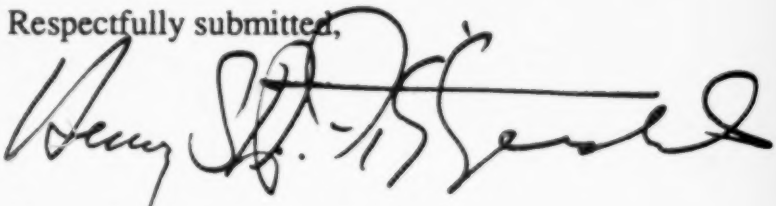
> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, "to secure the national rights & uniformity of Judgmts." The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved . . . .

Address of Chief Justice Vinson before American Bar Assn. (Sept. 7, 1949), 69 S. Ct. v, vi, see also Stern, Gressman & Shapiro, Supreme Court Practice 190 & n. 8, 191 (6th ed. 1986).

CONCLUSION

For the reasons submitted above, respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



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